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June 19, 1996

DOCKET FILE COPY ORIGINAL

Via Facsimile

Ms. Jackie Chorney
Federal Communications Commission
Chairman Reed Hundt's Office
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Re: Satellite Zoning and Covenant Preemption

Dear Jackie:

I have attached copies of documents that DirecTV or SBCA have recently filed as ex parte submissions in IB Docket No. 95-59. Please call me after you have reviewed them, and we can discuss what else we can do to assist the Commission in establishing workable rules that will protect the DBS industry without unnecessarily trammeling on local requirements that do not impair the DBS industry's ability to compete with cable.

Very truly yours,

James F. Rogers
of LATHAM & WATKINS

Enclosure
cc (w/att.): William F. Caton, Acting Secretary, FCC
Ex Parte Presentation, IB Docket No. 95-59

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June 17, 1996

Writer's Direct Dial Number
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By Messenger

William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

Re: *Ex Parte Presentation, IB Docket No. 95-59*

Dear Mr. Caton:

On June 17, 1996, I along with Andy Paul of the Satellite Broadcasting and Communications Association ("SBCA"), Buddy Davis of Davis Antennas, Merrill Spiegel of Hughes Electronics, and Jim Rogers and Steven Schulman of Latham & Watkins, counsel to DIRECTV, Inc., met with William H. Johnson, Deputy Chief of the Cable Services Bureau; Jackie Spindler, Deputy Chief of the Consumer Protection and Competition Division of the Cable Services Bureau; Meryl Icove of the Cable Services Bureau; John P. Stern, Senior Legal Advisor to the Chief of the International Bureau; Rosalee Chiara of the International Bureau and two FCC summer interns regarding the above-captioned proceeding. I appeared on behalf of SBCA.

In addition to topics already discussed in our comments in this proceeding, we discussed the scope of Section 25.104 and its applicability to various local codes. We also discussed the substance of the attached documents concerning proposed language revising Section 25.104 and federal preemption of contracts between private parties. We provided copies of the attached map to discuss our proposed paragraph 25.104(e).

Please associate the attached documents with this docket.

If you have any questions regarding this filing, please do not hesitate to contact me at (202) 887-8745.

Very truly yours,

Diane S. Killory

Enclosures

cc: William H. Johnson (w/encl. except map)
Jackie Spindler (w/encl. except map)
John P. Stern (w/encl. except map)
Rosalee Chiara (w/encl. except map)
Meryl Icove (w/encl. except map)

Proposed Changes to Section 25.104 of the FCC's Rules

25.104(b): Any state or local zoning, land-use, building, or similar regulation that ~~affects~~ **impairs** the installation, maintenance, or use of:

(1) a satellite earth station antenna that is two meters or less in diameter and is located or proposed to be located in any area where commercial or industrial uses are generally permitted by nonfederal land-use regulation; or

(2) a satellite earth station antenna that is one meter or less in a diameter in any area, regardless of land use or zoning category

~~shall be presumed unreasonable and is therefore~~ **is** preempted ~~subject to paragraph (b)(2)~~. No civil, criminal, administrative, or other legal action of any kind shall be taken to enforce any regulation covered by this ~~presumption~~ **preemption until** ~~unless~~ the promulgating authority has obtained a waiver from the Commission pursuant to paragraph (e)~~, or a final declaration from the Commission or a court of competent jurisdiction that the presumption has been rebutted pursuant to subparagraph (b)(2)~~. **No liability may be assessed or action taken (including, but not limited to, the issuance of any directive or order requiring the disassembly of the satellite antenna) against a person for actions taken to install a satellite earth station antenna prior to a final Commission decision.**

25.104(f): No restrictive covenant, encumbrance, homeowners association rule, or other nongovernmental restriction shall be enforceable to the extent that it impairs a viewer's ability to receive video programming services over a satellite antenna one meter or less in diameter.

25.104(h): For purposes of this section, a restriction will be deemed to "impair" if it affects the technical reception by, increases the cost of installation or maintenance of, or delays or prevents the installation or use of a satellite antenna.

25.104(e): Any state or local authority that wishes to maintain and enforce zoning or other regulations inconsistent with this section may apply to the Commission for a full or partial waiver of this section. Such waivers shall be granted by the Commission in its sole discretion, upon a showing by the applicant that ~~local concerns of a highly specialized or unusual nature~~ **(i) the regulation is essential for preserving or protecting a highly specialized or unusual nature of a particular location; (ii) the regulation affects satellite antennas only to the extent necessary to preserve the highly specialized or unusual nature of the particular location; and (iii) satellite antennas are in practice no more restricted than are other appurtenances at the particular location, including, but not limited to, cable pedestals, basketball hoops, signage, garbage receptacles, and HVAC equipment.** No application for waiver shall be considered unless it specifically sets forth the particular regulation for which waiver is sought. Waivers granted in accordance with this section shall not apply to later enacted or amended regulations by the local authority unless the Commission expressly orders otherwise. **No application for waiver relating to an historic district or landmark shall be considered unless: (i) the historic district or landmark has been designated by an authority certified to carry out the purposes of the National Historic Preservation Act of 1966, 17 U.S.C. § 470a(b), (c); (ii) the regulation affects satellite antennas only to the extent necessary to preserve the historic character of the district or landmark; and (iii) satellite antennas are in practice no more restricted than are other appurtenances in the district or at the landmark, including, but not limited to, cable pedestals, basketball hoops, signage, garbage receptacles, and HVAC equipment.**

MORRISON & FOERSTER LLP

MEMORANDUM

RE: Federal Preemption of Contracts Between Private Parties

DATE: June 14, 1996

The ability of Congress to change the contractual relationship between private parties through the exercise of its constitutional powers (*e.g.*, the Commerce Clause, Art. I, § 7) is firmly established. As such, the FCC's preemption of homeowners association restrictions on satellite dishes, in accordance with section 207 of the 1996 Telecommunications Act, is a lawful exercise of federal authority.

As a general matter, the Supreme Court has made it very clear that private contracts are not outside the reach of proper federal authority. The Court has stated unequivocally:

> Contracts, however express, cannot fetter the constitutional authority of Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.
>
> If a regulatory statute is otherwise within the powers of Congress, therefore, its application may not be defeated by private contractual provisions. For the same reason, the fact that legislation disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking.

Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 223-24 (1986) (quotations and citations omitted).

One early case recognizing the power of Congress to preempt private contracts is *Louisville & Nashville R.R. Co. v. Mottley*, 219 U.S. 467 (1911). In that case, the Mottleys entered into a settlement contract with the Louisville & Nashville Railroad that entitled them to a lifetime of free railroad travel. *Id.* at 472. Thirty-five years later, Congress passed a statute that prohibited the issuance of free passes to passengers like the Mottleys. *Id.* at 473. In addition to a takings argument, the Mottleys argued that Congress lacked the power to modify their agreement. *Id.* at 480. The Court rejected both arguments. *Id.* at 482. The Court observed that all "contracts must be understood as made in reference to the possible exercise of the rightful authority of the Government." *Id.* (quoting *Knox v. Lee*, 79 U.S. (12 Wall.) 457, 550-51 (1871)). Thus, the Court concluded:

> The agreement between the railroad company and the Mottleys must necessarily be regarded as having been made subject to the possibility that, at some future time,

> Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforceable or to impair its value.

Id. As a result, Congress was free to modify, within the exercise of its commerce clause power, the existing contract between these two private parties.

Another early case in which the Court held that Congress had the power to invalidate the provisions of existing contracts is *Norman v. Baltimore & Ohio R.R. Co.*, 294 U.S. 240 (1935). In *Norman*, the issue involved a bond contract between Norman and the Railroad that contained a provision requiring payment based on the value of gold.[1] *Id.* at 291. As in *Mottley*, Congress passed a statute that invalidated a specific contract provision. In the *Norman* case, the law prohibited such "gold clauses" in contracts. The central issue before the Court was whether Congress had "[t]he power to invalidate the provisions of existing contracts" between private parties. *Id.* at 306. The Court held that Congress did enjoy this power and observed that "[t]here is no constitutional ground for denying to the Congress the power expressly to prohibit and invalidate contracts although previously made, and valid when made, when they interfere with the carrying out of the policy it is free to adopt." *Id.* at 309-10.

Modern examples can be found as well. Many of these involve the contractual relationship between employer and employee where the federal statute imposes additional obligations on the contractual relationship. For instance, *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1975), involved the application of the Federal Coal Mine Health and Safety Act, 30 U.S.C. § 901 et seq., to employment contracts. One of the challenges to the Act involved a provision that required the mining companies to compensate *former* employees who left *before* the Act was passed. 428 U.S. at 14. In essence, Congress modified completed contracts. In upholding this aspect of the Act, the Court noted that Congress had the power to pass legislation that readjusted "rights and burdens" between private parties. *Id.* at 16. *See also Connolly*, 475 U.S. at 224 (upholding a statute that in effect "nullified a contractual provision limiting liability"); *Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602, 639-40 (1993) (reaffirming that "federal legislation" can modify existing contractual obligations).

Homeowner covenants do not enjoy special immunity from federal power. For example, in *Mayers v. Ridley*, 465 F.2d 630 (D.C. Cir. 1972) (per curiam), the Court of Appeals *en banc* permitted a challenge by homeowners attacking the legality of racially restrictive convenants to proceed. The petitioners sought to enjoin the local recorder of deeds from accepting deeds with such restrictive covenants. In permitting the challenge, three members of the court opined that the Fair Housing Act of 1968, 42. U.S.C. § 3604(c) (1970), rendered existing racially restrictive covenants "unlawful," 465 F.2d 630, 631 n.1 (Wright, J. concurring), and noted that the Supreme Court's decision in *Shelly v. Kraemer*, 334 U.S. 1 (1948) had made such covenants judicially unenforceable.

---

[1] In *Norman*, the face value of the coupon was $22.50 gold coin. At the time, the equivalent weight of $22.50 of gold coin was worth $38.10. The railroad refused to pay the $38.10 and offered to pay the $22.50 in currency. Norman refused this offer and sued.

In addition to statutes that negate contractual provisions, regulations that affect private contractual relationships, when promulgated pursuant to constitutional statutes, are permitted. For example, in *Chang v. United States*, 859 F.2d 893 (Fed. Cir. 1988), the petitioners challenged the application of a Department of Treasury regulation that in effect rendered an employment contract nugatory.[2] The court essentially found that the "regulatory statute" preempted the "private contractual provisions." 859 F.2d at 895.

More specifically, the FCC itself has intervened to invalidate certain terms of private contracts relating to property rights. Under the authority of the Pole Attachment Act, 47 U.S.C. §224, the Common Carrier Bureau found certain rates in Florida Power Corporation's pole attachment contracts to be unjust and unreasonable. The utility unsuccessfully argued that these decisions improperly abrogated contracts that predated the enactment of the Pole Attachment Act and thus constituted a Fifth Amendment taking. In upholding the Bureau's decisions, the full Commission noted:

> It is well established that contracts made in areas of governmental regulation are subject to modification by subsequent legislation. . . . The ability of Congress to react to changing conditions and to legislate in the public interest cannot be restricted by private agreements. Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution.

Teleprompter Corp. and Teleprompter Southeast, Inc., v. Florida Power Corporation, File No. PA-81-0008 et al., 1984 FCC LEXIS 1874 (Oct. 3, 1984) (quotations and citations omitted), *rev'd on other grounds by Florida Power Corp. v. FCC*, 772 F.2d 1537 (11th Cir. 1985), *rev'd on other grounds by FCC v. Florida Power Corp.*, 480 U.S. 245 (1987). Because the Supreme Court reversed the court of appeals, thereby leaving intact the FCC decision, the Court upheld the Commission's right to "regulate the rates, terms and conditions for pole attachments," as mandated by the Pole Attachment Act, even though the result of that regulation was to interfere with and invalidate provisions contained in private contracts, including those entered into prior to the Pole Attachment Act.

In conclusion, there is ample legal precedent to support the lawfulness of the FCC's proposed rule to preempt (and thereby nullify) existing homeowners association covenants that impair a viewer's ability to receive satellite signals.

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[2] Pursuant to an executive order issued under the authority of the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706 (1982), the Department of the Treasury promulgated regulations (31 C.F.R. §550 (1986)) that prohibited U.S. nationals from performing contracts with Libya. 859 F.2d at 894.

MEMORANDUM

RE: Analysis of Proposed Section 25.104(f) Under the Fifth Amendment

DATE: June 19, 1996

The federal government may enact statutes and promulgate regulations that prohibit the enforcement of restrictive covenants, encumbrances and homeowners' association rules that are inconsistent with a legitimate federal objective. Such enactments are not considered "takings" requiring compensation pursuant to the Fifth Amendment of the Constitution of the United States.

The Commission has proposed, in Section 25.104(f) of its Rules, to render unenforceable any "restrictive covenant, encumbrance, homeowners' association rule, or other nongovernmental restriction . . . [that] impairs a viewer's ability to receive video programming services over a satellite antenna less than one meter in diameter." *See Preemption of Local Zoning Regulation of Satellite Earth Stations,* FCC 96-78, ¶ 62 (Further Notice of Proposed Rulemaking, March 11, 1996). As the Commission noted in the Further Notice, proposed Section 25.104(f) reflects Congress's objectives in passing Section 207 of the Telecommunications Act of 1996, the legislative history of which expresses an explicit desire to remove private, nongovernmental restrictions that impair a viewer's ability to receive signals by DBS antennas. H.R. Rep. No. 204, 104th Cong., 1st Sess. at 124 (1995) ("existing regulations, including . . . restrictive covenants or home owners' association rules, shall be unenforceable to the extent contrary to this section").

A restrictive covenant is an interest in real property in favor of the owner of the "dominant estate" that prevents the owner of the "servient estate" from engaging in an activity he or she would otherwise be privileged to do. POWELL ON REAL PROPERTY, § 34.02[2] (1995). Restrictive covenants are "part and parcel of the land to which they are attached." *Chapman v. Sheridan-Wyoming Coal Co.,* 333 U.S. 621, 627 (1950). Restrictive covenants are used by homeowners' associations, for example, to prevent property owners within the association from engaging in myriad activities, including the installation of satellite antennas. Section 25.104(f) would prohibit the enforcement of these restrictive covenants to the extent they impair a viewer's ability to receive signals over a satellite antenna one meter in diameter or smaller.

The Fifth Amendment requires the government to compensate a property owner if it "takes" the property. *See, e.g., Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1014-15 (1992). Direct appropriation of property is the classic form of taking, and at one time such condemnation was thought to be the only compensable taking under the Fifth Amendment. *See Legal Tender Cases,* 20 L. Ed. 287 (1871).

Unlike the cases where a court has found a taking of a restrictive covenant, Proposed Section 25.104(f) contemplates no direct appropriation of property by the federal government. *See, e.g., Adaman Mutual Water Co. v. United States,* 278 F.2d 842 (9th Cir. 1960) (condemnation of servient estate led to finding that negative easement had been taken); *Washington Suburban Sanitary Comm'n v. Frankel,* 470 A.2d 813, 816-17 (Md. App. 1984) ("a negative easement is a property interest the taking of which compensation must be paid when the easement is extinguished by condemnation of the servient tenement"), *vacated on other grounds,* 487 A.2d 651 (Md. 1985).

Fifth Amendment jurisprudence has developed, however, to recognize that in some circumstances a government regulation can be so burdensome as to effect a taking of property, without actual condemnation or appropriation. *Lucas,* 505 U.S. at 1015. These "regulatory takings" are divided into two classes of *per se* takings, which require no further analysis of the public purpose behind the regulation. *Id.* A regulation will be considered a *per se* taking if it (i) requires the landowner to suffer any permanent physical invasion of his property by a third party, or (ii) "denies all economically beneficial or productive use of land." *Id.* If a regulation does not result in a *per se* taking, the courts will engage in an "*ad hoc* inquiry" to examine "the character of governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980).

The prohibition on enforcement of certain restrictive covenants in proposed Section 25.104(f) is not a *per se* regulatory taking. First, the homeowner who holds the restrictive covenant will not suffer any physical occupation of his land if his or her neighbor is permitted to install a DBS antenna on his own property. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982) (statute that required landlord to allow cable television company to install cables on building resulted in taking).

Second, allowing the installation of a DBS antenna will not render the value of either party's land economically useless. Indeed, neither the owner of the dominant estate nor the owner of the servient estate is likely to suffer *any* diminution in value of his or her property by nullification of restrictions on DBS antennas less than one meter in diameter. *See, e.g., Lucas,* 505 U.S. at 1033 (holding that a South Carolina statute requiring a property owner to leave his two beachfront lots in their natural state would violate the takings clause by rendering the land economically useless without providing just compensation, unless state could show development prohibited by nuisance law).

A taking challenge to proposed Section 25.104(f) would therefore be examined under the "multifactor analysis," which considers "the character of governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *PruneYard,* 447 U.S. 74. Under this analysis, the government has "considerable latitude in regulating property rights in ways that may adversely affect the owners." *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470 (1987). This latitude allows the government to abrogate restrictive covenants that interfere with the federal objectives enunciated in the regulation. *See, e.g., Senior Civil Liberties Ass'n v. Kemp,* 761 F. Supp. 1528, 1559 (M.D. Fla.

1991) (dismissing Fifth Amendment challenge against Fair Housing Amendments Act of 1988, holding that "[e]ven when a state recognizes a certain property right as a separate interest, its abrogation is not necessarily a taking"), *aff'd.* 965 F.2d 1030 (11th Cir. 1992).

The Fair Housing Amendments Act discussed in *Senior Civil Liberties* declared unlawful, *inter alia,* any refusal "to sell or rent . . . or to otherwise make unavailable or deny, a dwelling to any person" because of the age of his or her family members. 42 U.S.C. § 3604. While Congress did not expressly state so in the statute, it intended that the Housing Act would prohibit the enforcement of "special restrictive covenants or other terms or conditions" inconsistent with its purposes. H.R. Rep. No. 711, 100th Cong., 2d Sess. 23-24 (1988); *see also United States v. Scott,* 738 F. Supp. 1555, 1561 D. Kan. (1992) (describing legislative history of Housing Act).

Members of a homeowners' association challenged the validity of the Housing Act under the Fifth Amendment, claiming that the federal government had taken their restrictive covenants without compensation. *Senior Civil Liberties,* 761 F. Supp. at 1533. These restrictive easements were contained in the homeowners' association's Declaration of Restrictions and required, among other things, that at least one resident of each home be at least fifty-five years of age. *Id.* Plaintiffs argued that these restrictive covenants had been "taken" by the Housing Act, which nullified the prohibition on younger residents in the neighboring properties covered by the Declaration. *Id.*

The court dismissed the taking claim, finding that the Housing Act promoted a legitimate government purpose and resulted in little economic harm to the Plaintiffs. *Id.* at 1558. First, the court found that the provisions of the Housing Act nullifying the restrictive covenants constituted a "public program adjusting the benefits and burdens of economic life to promote the common good," not a taking subject to compensation. *Id.* at 1558-59. Second, the court found it "difficult to ascertain to what extent [the Housing Act] took anything from Plaintiffs." *Id.; see also Westwood Homeowners Association v. Tenhoff,* 745 P.2d 976 (1987) (holding that a state legislative refusal to enforce restrictive covenants against group homes for developmentally disabled was not a taking).

A Fifth Amendment challenge to Section 25.104(f) would be dismissed under the *Senior Civil Liberties* analysis. The proposed rule would not result in any taking of property, but would merely adjust "the benefits and burdens of economic life to promote the common good." First, by providing all Americans, regardless of where they reside, with the freedom to access DBS services, the proposed rule advances the legitimate federal interest in making available "to all the people of the United States . . . world-wide wire and radio communication service." Section 1 of the Communications Act, 47 U.S.C. § 151.

Second, nullification of a landowner's ability to prevent his or her neighbor from installing a DBS antenna would have little, if any, economic impact upon the value of his property. In fact, allowing access to a competitor to cable television could make the property more attractive to a prospective purchaser. Moreover, a landowner would be hard-pressed to

show that she had "investment-backed expectations" in that part of the deed restrictions that would prevent her neighbors from installing less than one-meter DBS antennas.